



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 21, 2003

Mr. Kuruvilla Oommen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-3401

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181422.

The City of Houston (the "city") received a request for all e-mail messages sent or received by three named individuals from January 31, 2003 through February 7, 2003. You have made some of the information available to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.104, 552.107, 552.111, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Initially, we note that Exhibit 10 is subject to section 552.022 of the Government Code, which provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate.

Gov't Code § 552.022(a)(5). Upon review of Exhibit 10, we conclude that it constitutes working papers and information used to estimate the need for or expenditure of public funds. Thus, all working papers related to the estimate are subject to section 552.022(a)(5) of the Government Code. Because section 552.022(a)(5) applies to Exhibit 10, release is mandatory "unless [the information is] expressly confidential under other law." *Id.* § 552.022(a). You argue that Exhibit 10 is excepted from disclosure under section 552.111; however, discretionary exceptions are insufficient to make information confidential for purposes of section 552.022(a). *See, e.g., In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (stating that discretionary exceptions are not "other law" for purposes of Gov't Code § 552.022); Open Records Decision No. 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure). Accordingly, Exhibit 10 must be released since it is deemed public under section 552.022(a)(5) and is not expressly confidential under other law.

We will now address your arguments with respect to the remaining information. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.,* Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

In this case, you inform us that, at the time the city received the request, the city was negotiating with a particular company "regarding an integrated case management system for the municipal courts." You state that if Exhibits 2 through 7 are disclosed "before a contract is approved by City Council, the City's current negotiating position would be compromised." You indicate that release of the submitted information would place the system at a competitive disadvantage in negotiating the contracts for these Requests for Proposal. Based on these arguments and our review of Exhibits 2 through 7, we conclude that Exhibits 2 through 7 are excepted from disclosure based on section 552.104 until such time as the contract negotiations are complete and the contracts have been awarded and are in effect.

Next, you argue that Exhibits 8 and 9 are excepted from disclosure by section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that Exhibits 8 and 9 consist of communications between privileged parties for the purpose of rendering professional legal services and thus is excepted under section 552.107. You further indicate that these communications were intended to be confidential. Based on your representations and our review of the submitted information, we agree that the city may withhold Exhibits 8 and 9 under section 552.107(1).

We note that you have marked information in Exhibits 11 through 13 that is confidential under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

To the extent that the driver's license numbers and license plate number you have marked were issued by an agency of the State of Texas, they must be withheld under section 552.130.

Finally, we note that you have marked an e-mail address in Exhibit 13 that is confidential under section 552.137 of the Government Code. Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You have not indicated that the member of the public whose e-mail address appears in Exhibit 13 has consented to the release of the e-mail address contained in Exhibit 13. The city must, therefore, withhold the e-mail address you have marked under section 552.137.

In summary, you may withhold Exhibits 2 through 7 under section 552.104. You may withhold Exhibits 8 and 9 under section 552.107. To the extent they were issued by an agency of this state, you must withhold the driver's license numbers and license plate numbers you have marked in Exhibits 11 through 13 under section 552.130. You must withhold the e-mail address you have marked in Exhibit 13 under section 552.137. You must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, reading "Jennifer E. Berry". The signature is fluid and cursive, with the first name "Jennifer" and last name "Berry" clearly legible.

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 181422

Enc: Submitted documents

c: Mr. Wayne Dolcefino
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(w/o enclosures)